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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. PETER GATLIN et al., Defendants and Appellants.	B275745 (Los Angeles County Super. Ct. No. PA083280)

APPEALS from judgments of the Superior Court of Los Angeles County. David B. Gelfound, Judge. Affirmed as to Webly. Reversed as to Gatlin.

Christian C. Buckley, under appointment by the Court of Appeal, for Defendant and Appellant Peter Gatlin.

James Koester, under appointment by the Court of Appeal, for Defendant and Appellant Steven Webly.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Tita Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

In separate trials, Peter Gatlin (Gatlin) and Neville Sykes also known as Steven Webly (Webly)[1] were convicted on three counts of second-degree robbery (Pen. Code, § 211).[2] According to the People, Webly was the robber[3] and Gatlin was the getaway driver.

Both Gatlin and Webly appeal.

Gatlin contends that the robbery convictions must be reversed because the People failed to adduce sufficient evidence of aiding and abetting as to all three robbery counts; he was denied a fair trial due to multiple instances of prosecutorial misconduct, including argument that lessened the People's burden; he was denied effective assistance of counsel when defense counsel failed to object to the prosecutor's argument that lessened the People's burden; and the trial court erred when it refused to declare a mistrial after members of the jury interacted with a police officer witness and then failed to candidly answer the trial court's questions. We conclude there was insufficient evidence of aiding and abetting on two counts and, as to them, order entry of judgment in Gatlin's favor. As to the third count, we reverse and remand for a new trial based on, inter alia, the prosecutor's misconduct, including argument to the jury that lessened the People's burden.

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[1] To avoid confusion, we adhere to the parties' practice of referring to Neville Sykes as Webly.

[2] All further statutory references are to the Penal Code unless otherwise indicated.

[3] Gatlin does not dispute that Webly committed the three robberies.

Webly's appointed counsel filed a no merit brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436, 441 (*Wende*) raising no issues for us to consider. On December 13, 2016, we notified Webly of the no merit brief and gave him leave to file, within 30 days, a brief or letter setting forth any arguments supporting his appeal. He did not file a letter or brief within the prescribed time. Upon review of counsel's no merit *Wende* brief and the record, we conclude that there are no arguable issues, and Webly is not entitled to appellate relief.

FACTS

The March 17, 2015 Robbery

On March 17, 2015, at about 9:00 p.m., Webly robbed a Valero Gas Station in Pasadena. Between about 9:00 p.m. and 10:00 p.m. on that date, a Kyocera phone and Samsung phone later recovered from Gatlin utilized cell towers in the vicinities of the Valero Gas Station, Gatlin's residence, the residence of his friend Veda Scott (Scott), and the Siesta Motel.[4]

The March 18, 2015 Robbery

On March 18, 2015, at about 10:50 p.m., Webly robbed a Mobile Gas Station in Pasadena and forced the cashier, Mohammed Rahman (Rahman), to hand over his wallet containing his Costco card. On that date, from 10:40 p.m. to 10:55 p.m., the Samsung utilized cell towers in the vicinities of the Mobil Gas Station, Gatlin's residence, Scott's residence, and the Siesta Motel.

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[4] Based on one of the prosecutor's exhibits, it appears that Gatlin's residence was about 15 blocks or so from the Valero Gas Station. Scott's residence was perhaps 7 to 10 blocks away from Gatlin's residence.

The March 21, 2015 Robbery

On Saturday, March 21, 2015, at about 3:00 p.m., Webly robbed a Chevron Gas Station located in Los Angeles. On that day, around 2:26 p.m., the Kyocera utilized a cell tower in the vicinity of the Chevron Gas Station. At 3:05 p.m., the Samsung utilized a different cell tower in the same vicinity.

Various witnesses testified regarding March 21, 2015 video taken by surveillance systems at the Chevron Gas Station and a nearby business called Country Liquor before, during and after the robbery. Scott testified that she had loaned her car to Gatlin. In various stills taken from the video, she identified her car and "Chris."[5] Also, she identified Gatlin from a Country Liquor still that was time stamped 2:42 p.m.

The prosecutor played video for the jury. It depicted Scott's car driving through a parking lot, stopping in front of Country Liquor at 2:37 p.m., and then turning left between County Liquor and the Chevron Gas Station. The car proceeded to an adjacent parking lot that serviced a Pizza Hut, and paused there at 2:38 p.m. before circling around the Chevron Gas Station, driving past the gas pumps and continuing on to a parking space near Country Liquor. After three or four minutes, Gatlin exited the car, walked into Country Liquor and bought Lottery tickets. He returned to the car at 2:44 p.m. He pulled straight through a parking space and turned right, heading away from the Chevron Gas Station. Soon after, from the street, he turned into the area between Country Liquor and the Chevron Gas Station, then drove past the gas pumps and circled back around to the Pizza

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[5] According to the People, "Chris" is the only name by which Scott knew Webly.

Hut. At 2:46 p.m., Gatlin backed the car into a parking space directly in front of the Pizza Hut. About 10 minutes later, Webly got out of the car, walked to the Chevron Gas Station. He committed the robbery, then walked back to the Pizza Hut parking area. At 2:59 p.m., as Webly approached the car, Gatlin pulled the car part of the way out of the space. Webly got into the car. As he was closing the door, Gatlin drove the car forward. They left the parking lot.

Attempted Fraud at Costco; Arrest of Gatlin

Scott went to a Costco store with Gatlin and a person named Wes.[6] At one point, she saw Wes talking to a sales representative.

A loss prevention agent at the store was alerted by management that a man had attempted to use fake identification to get an American Express Costco Card, and that the store had confiscated a Costco card and a driver's license. The agent was given a Costco card with Rahman's name and a scratched out picture on the back, and also a driver's license with Rahman's name and Wes's photograph. The agent used the store's video surveillance to locate the person (Wes) who had brought the license and card into the store, and to track that person to the parking lot where he met two people in a Cadillac (Scott's car).

On April 2, 2015, Detective Marcelo Raffi of the Los Angeles Police Department was assigned to a plain clothes tactical surveillance unit. He and his team were working on

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[6] The People maintain that Wes's last name is McGraw. Costco surveillance video depicted Wes leaving the Costco, walking through the parking lot and getting into a dark colored vehicle with two occupants. The inference is that they were Gatlin and Scott.

Wes's attempted fraud and had the license plate number for Scott's car. After staking out Scott's residence, they eventually saw Scott's car. They followed as Gatlin drove it to the Siesta Motel in Pasadena. Detective Raffi observed Gatlin and a White male go from room 111 to room 113. Minutes later, they went to the Cadillac. The prosecutor asked Detective Raffi what observations he made. The detective replied, "[W]e had . . . been given photos of [Gatlin] and a [White male] . . . from a Costco surveillance picture." The detective continued on, stating, "[W]hen I was observing the suspects . . . , I noted that both of them looked familiar to the photos that we had been given for this case." Gatlin dropped the White male off at another motel. Detective Raffi and his team followed Gatlin when he drove away, and then decided to take him into custody. They performed a traffic stop.[7] The officers recovered "some lottery tickets, [a] cell phone, [and] money" from Gatlin.

Detective Raffi was shown a photograph of a White male and said it appeared to be the White male he saw "that day."

A detective with the Pasadena Police Department searched rooms 111 and 113 at the Siesta Motel. In room 113, he found

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[7] In the opening brief, Gatlin states that Rahman's Costco card was found in the car. The People state, "[Gatlin] was arrested. Officers recovered some lottery tickets from his car, $404, and the Costco card belonging to Rahman." Both parties provide record citations. However, none of these record citations establish that Gatlin had Rahman's Costco card. We note that it is unclear how Rahman's Costco card could be in the possession of both the Costco loss prevention agent and Gatlin. Neither party explains this conundrum. Suffice it to say, there is no dispute amongst the parties that Gatlin possessed Rahman's Costco card.

parolee paperwork and an identification card in the name of one of Webly's aliases.[8]

Police detained Wes.

Gatlin's Interview

Detective Timothy Kohl of the Los Angeles Police Department testified that he and another detective interviewed Gatlin. A recording of the interview was played for the jury. During the interview, Gatlin said that on Saturday, March 21, 2015, he went to Labor Ready, a place where jobs are listed online. After saying he bought Lottery tickets on Sepulveda, he was asked where he had come from. He said, "I came from Pasadena and went to Sepulveda."

According to Detective Kohl, Labor Ready is closed on Saturdays. Also, the Labor Ready on Sepulveda was a few miles south of the Chevron Gas Station, and Pasadena was northeast of the Chevron Gas Station. Moreover, Detective Kohl testified that there was a Labor Ready in Pasadena, and that there were a variety of convenience stores, liquor stores and gas stations between the Chevron Gas Station and the Labor Ready on Sepulveda.

GATLIN'S APPEAL

I. Sufficiency of the Evidence.

As we discuss below, there was insufficient evidence to support Gatlin's convictions regarding the March 17, 2015, and March 18, 2015, robberies. As to those two convictions, the

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[8] The People contend the police saw Gatlin meet with Webly at the Siesta Motel. The problem with the People's contention is that Webly is Black and the testimony from Detective Raffi established that the person seen with Gatlin at the Siesta Motel was White.

double jeopardy clause precludes a second trial. (*People v. Seel* (2004) 34 Cal.4th 535, 544.) In contrast, contrary to what Gatlin argues, sufficient evidence supports his conviction for the March 21, 2015, robbery.

A. *Standard of Review*.

When a defendant challenges the sufficiency of the evidence to support a criminal conviction, we review the record in the light most favorable to the judgment to determine whether any rational trier of fact could have concluded beyond a reasonable doubt that the prosecution established the essential elements of the crime. (*People v. Osband* (1996) 13 Cal.4th 622, 690.) We indulge every fact the trier of fact could reasonably deduce from the evidence. (*Ibid.*) Thus, "[b]efore the judgment of the trial court can be set aside for insufficiency of the evidence to support the verdict of the jury, it must clearly appear that upon no hypothesis whatever is there sufficient substantial evidence to support it. [Citation.]" (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

On the other end of the spectrum, evidence is not sufficient (i.e., substantial) unless it is reasonable, credible and solid. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) Under this standard, "'[e]vidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact. [Citations.]'" (*People v. Tripp* (2007) 151 Cal.App.4th 951, 955–956 (*Tripp*).) As a result, "[S]peculation or conjecture alone is not substantial evidence." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.) "'Circumstantial evidence is like a chain which link by link binds the defendant to a tenable finding of guilt. The

strength of the links is for the trier of fact, but if there has been a conviction notwithstanding a missing link it is the duty of the reviewing court to reverse the conviction.' [Citation.]" (*Tripp*, *supra*, at p. 956.)

B. *Legal Principles*.

Section 31 establishes that all persons who aid and abet the commission of a crime are principles in any such crime. "'A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime.' [Citations.] [¶] 'Whether defendant aided and abetted the crime is a question of fact, and on appeal all conflicts in the evidence and reasonable inferences must be resolved in favor of the judgment.' [Citation.]" (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409 (*Campbell*).) Among the factors for a trier of fact to consider are a defendant's presence at the scene of a crime, companionship between the perpetrator and the person accused of aiding and abetting, and conduct before and after the offense. (*Ibid*.)

Robbery is not just the taking of property from a victim. Rather, a robbery "'is ongoing "'until the robber has won his way to a place of temporary safety.'" [Citation.]'" (*People v. McDonald* (2015) 238 Cal.App.4th 16, 24.) "[F]or aider and abettor liability where *robbery* is concerned, 'a getaway driver must form the intent to facilitate or encourage commission of the robbery prior to or during the carrying away of the loot to a place of temporary safety.' [Citations.]" (*Ibid*.)

C. *Analysis*.

1. The March 17, 2015, Robbery.

Based on the record, there is no reasonable inference that Gatlin knew of Webly's unlawful purpose on March 17, 2015. It is possible that Gatlin had the Kyocera and Samsung near the time of the robbery, but it is also possible that he did not have them. Moreover, it is mere speculation that Webly told Gatlin about the robbery, Gatlin promoted the robbery, and Gatlin was aware of facts indicating a robbery had taken place. Even if it could reasonably be inferred that Gatlin possessed the Kyocera and Samsung near the time of the robbery, it is speculative to say he was at the scene. As explained by *Tripp*, mere possibilities do not support factual inferences. (*Tripp*, *supra*, 151 Cal.App.4th at pp. 955–956.) Here, the People rely on a chain of inferred facts. But this is a case where not just one link in the chain is missing; many are missing.

Nor is there a reasonable inference that Gatlin intended to aid Webly by being a getaway driver, and then in fact acted as his getaway driver by taking him to a place of temporary safety. It is speculation (i.e., assumes a merely possibility) that Gatlin was driving with the Kyocera and Samsung near the time of the robbery.[9] Even if he was, it is speculation that he gave Webly a ride to a place of temporary safety. It is possible Gatlin picked Webly up after he had reached a place of temporary safety, and therefore after the robbery was complete. The possibility that Gatlin may have driven to the Siesta Motel does not support any

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[9] In the respondent's brief, the People posit that Gatlin "acknowledged he had been driving [Scott's] car on the days the robberies occurred." As was often the case in this appeal, the People's record citations do not hold up.

particular inference of fact. While the police found an identification and some of Webly's parolee paperwork in room 113 of that motel on April 2, 2015, there was testimony suggesting that on April 2, 2015, Gatlin went to the Siesta Motel to meet Wes. Thus, on March 17, 2015, it is possible that Gatlin drove to the Siesta Motel to see Wes rather than to take Webly there from the robbery.

The People suggest that speculation regarding what happened on March 17, 2015, solidifies into an inference of fact when the rest of the prosecution evidence is considered because it reveals an undeniable criminal pattern. But the evidence surrounding the March 18, 2015, robbery gives rise to insufficient speculation similar to what we discussed above. The one difference is that the police found Gatlin in possession of Rahman's Costco card. While that might well support a possession of stolen property charge, it does not establish that on March 18, 2015, Gatlin knew about the robbery before or during, or that he drove Webly to a place of temporary safety. This leaves us with the March 21, 2015, robbery. The evidence surrounding that robbery does not change the speculative nature of any inference about Gatlin's involvement in the March 17, 2015, robbery.

2. The March 18, 2015 Robbery.

For the same reasons discussed as to the March 17, 2015 robbery, it is speculative to conclude that on March 18, 2015, Gatlin knew of Webly's unlawful purpose before or during the robbery, and that he drove Webly to a place of temporary safety. Again, Gatlin's possession of Rahman's Costco card only suggests possession of stolen property.

3. The March 21, 2015, Robbery.

The surveillance video from March 21, 2015, shows that Gatlin circled the Chevron Gas Station several times, parked near Country Liquor and bought Lottery tickets, reversed into a parking lot in front of a Pizza Hut, waited in the car while Webly got out and went into the Chevron Gas Station for several minutes, pulled forward to intercept Webly as he approached the car after the robbery, began driving forward even before Webly closed the door, and then left the parking lot.

Gatlin's interview revealed consciousness of guilt because the evidence favorable to the verdict established that he lied about why he was in the vicinity of the Chevron Gas Station. (*People v. Thornton* (2007) 41 Cal.4th 391, 439.) Also, flight immediately after the commission of the offense[] is a circumstance that may be considered, with other facts of the case, as tending to show a consciousness of guilt." (*People v. Leach* (1949) 90 Cal.App.2d 667, 671.)

From these facts, the jury could have reasonably inferred that Gatlin knew either before, during or after the robbery about Webly's intent and/or actions. Also, it could have reasonably inferred that Gatlin helped Webly case the Chevron Gas Station, helped him flee the scene of the crime, and transported him to a place of temporary safety.

II. The Conviction for the March 21, 2015, Robbery Must be Reversed and Remanded for a New Trial Due to Prosecutorial Misconduct and Ineffective Assistance of Counsel.

As discussed below, we conclude that the judgment must be reversed regarding the conviction for the March 21, 2015, robbery because: (1) the prosecutor committed prejudicial misconduct by

lessening the People's burden, and by exacerbating the impact of that misconduct by denigrating and attacking defense counsel in multiple ways; and (2) defense counsel provided ineffective assistance by failing to object when the prosecutor lessened the People's burden.

A. *Relevant Proceedings*.

In the closing argument, the prosecutor stated: "Look, honestly, this case isn't complicated. . . . [In] three robberies [Gatlin] was the driver." In addition, according to the prosecutor, the case was about "three individuals who decide they will make fast money."

Regarding the Valero Gas Station robbery, the prosecutor said, "The . . . question is who was waiting outside. That's [Gatlin]. How do we know [Gatlin] was waiting outside? Because of his phone records." The prosecutor also said, "Right after the robbery, guess where [Gatlin's] phone is going to? The Siesta Motel where who lives? Webly. He [*sic*] was at home. Then Webly showed up. Then he gives him a ride to the hotel. That is also an aider and abettor. That's what [Gatlin] is doing. We all know [Gatlin is] not the one who actually committed the robbery. But he's aiding and abetting a robbery."

As for the Mobile Gas Station robbery, the prosecutor again said Gatlin was present because his number registered off the nearest cell tower. Then the prosecutor stated that "[w]e know who is outside" because of a video. According to the prosecutor, "You can see as the car pulls—you can see a car pulls up, then you will see Webly come out of there, and then you'll also see when he runs back, you'll see a car leaving at that location at that time. This isn't rocket science. It's common sense. He's not

working alone."[10] The prosecutor pointed out that Rahman's Costco card was used by Wes at Costco, and said, "Who do we know is there is [Gatlin]. That's also how we know he was involved in the robbery. . . . His cell phone was there at the time. He's the one with the property."

With respect to the Chevron Gas Station robbery, the prosecutor argued that the video established that Gatlin cased the gas station. The prosecutor asked, "Who does this? Who acts like this? Criminals act like this." He also said, "Come on, folks, what is going on here? Who acts like this suspiciously? Who has this kind of time to be cruising this gas station?" The prosecutor stated that after Webly came out of the gas station, Gatlin drove away. Moreover, per the prosecutor, "Why didn't [Gatlin] just jump on the freeway and go home? Suspicious behavior. No-brainer. You get a verdict form and you go guilty because that's what he did. He's the driver. Three robberies. [Gatlin] is in fact guilty."

The prosecutor did not discuss the meaning of the reasonable doubt standard. Nor did he discuss the elements of robbery or aiding and abetting. The prosecutor repeatedly theorized about what the defense would argue, stating, inter alia: "I will get to what the facts were again so we can hear what the defense has to say, because I'm sure that is what everybody is wondering, what is the defense?" "What is [defense counsel] [going to] say? I'll hurry so we can hear what he has to say.

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[10] Neither party cited to evidence supporting the prosecutor's assertion that video captured Webly getting into a car after the Mobile Gas Station robbery. Following the robbery, Rahman testified that he saw the robber go into a parking lot behind a Ross store.

There is no defense to this." "[Defense counsel] will come up here and I believe make some kind of argument. I can't imagine what he is [going to] argue." The prosecutor warned the jury about what defense counsel might argue, saying, "If [defense counsel] talks about other standards of proof, that's just another attempt to distract you from what this case is really about."

In his rebuttal, the prosecutor said he was "perplexed" as to why defense counsel's closing argument "took so long." The prosecutor recounted that defense counsel talked about other standards of proof such as preponderance of the evidence and clear and convincing evidence. Then the prosecutor said "[t]hese kind of arguments" reminded him of a Disney movie with a talking dog, and explained, "As [the dog is] talking he would get distracted by a squirrel. So he was really focused, focused on something. Squirrel. He would get distracted. That is what this is about. Right? [Defense counsel is] talking about other things that have nothing to do with this case. It's a squirrel. Hoping that you are going to look the other way and think about other things. [¶] For one hour I sat up here. The whole thing was just an attack on your common sense. That is what it was. He attacked your ability to use your common sense in this case. That's called lawyering."

According to the prosecutor, defense counsel argued that the whole case was circumstantial. The prosecutor said, "I'm not sure why he argues that to you. He's attacking your common sense again. . . . It is an attack. It's a squirrel. Right? [¶] Then on top of that he kind of tried to impugn my integrity by saying[,] 'He played this video over and over again.' That's not true. I played it once at opening, once for the witnesses to lay the foundation for you, and once at the end. Is that not reasonable?

Well, guess what? How many times did [defense counsel] play any video? Zero. Goose egg. Why? Because if you see the videos, it's guilty. That's why. That's why [h]e played it zero times for you."

Later on, the prosecutor again referred to defense counsel attacking the jury's common sense and said, "I was just amazed." The prosecutor continually expressed incredulity at defense counsel's arguments, and editorialized on those arguments with comments such as "What in the world?" and "Are you serious?" and "It's crazy." The prosecutor said defense counsel wanted the jury to speculate as to what was said in the car Gatlin was driving on the day of the Chevron Gas Station robbery. Then the prosecutor asked, "Why does he want you to focus . . . on these facts? Because [Gatlin] is guilty."

The prosecutor explained that the standard of proof was "reasonable doubt" and then said: "What does that mean? It's a very simply way of putting it. The legal definition of reasonable doubt is that [*sic*] doubt that leaves you with an abiding conviction that the charges are true. It doesn't mean to eliminate all doubt or all imaginary doubt or all possible doubt because everything in life is open to some form of doubt or imaginary or possible doubt. This is the legal definition.

"What I'm telling you is reasonable doubt is a doubt that you get to decide as far as what is reasonable. Who is the reasonable person? You are all the reasonable people. If you believe that a reasonable person would act the same way that [Gatlin] did on those days, then you vote not guilty. If you believe that all his actions were reasonable, you vote not guilty. That's what reasonable doubt or an interpretation is. You heard the legal definition and one that I'm arguing. So let's go through

[Gatlin's] actions. Let's talk about this, some of these actions. You need to decide if a reasonable person would act this way. . . . These are questions that over an hour of argument [defense counsel] didn't even touch upon.

The prosecutor talked about Gatlin's trip to Costco with Wes and said, "Assume for a second that [Gatlin]—just assume for the sake of argument so we can have a little laugh[—]that [Gatlin] . . . did not know what was going on with Wes. So if you take a friend to buy something or purchase something at Costco, if they come out empty handed, what is the first thing you say? Did you see him coming then walk away. And you say, "Oh, I'm out of here.' Is that what you say to your friends? It's not reasonable what happened. Empty handed? You made me bring you all this this way? You don't have anything? Really, is that reasonable? If you think that is reasonable, not guilty. But as Costco customers we all know that is not reasonable. Not only that, but you stop. If you are with a friend, you just walk ahead of him? Or do you stop and walk with him and talk about whatever you want to talk about, or get explanation what happened inside. You didn't buy anything. [¶] These actions are not reasonable. Look at what happens. He walks away. And they don't even wait for him to get in the car. You think they don't know what was going on?" The prosecutor asked the jury to use its common sense to decide what happened at Costco.

Regarding Gatlin's contention that he went to Labor Ready on March 21, 2015, the prosecutor stated that it was not reasonable for Gatlin to go to a Labor Ready location on Sepulveda when there was one near his residence. According to the prosecutor, "There is no other reasonable interpretation that [Gatlin] and his group of friends are committing these robberies."

The prosecutor asked why defense counsel did not talk about Gatlin's story regarding the day of the Chevron Gas Station robbery, pointing out that Gatlin was in the vicinity for 22 minutes. At that point, the prosecutor said, "You think that is reasonable just for scratchers? 22 minutes."

Continuing on, the prosecutor (apparently showing a video) said, "Then you are tasked to figuring out what was reasonable here. Okay? So the first thing is if he's [going to] go buy the scratchers, he's already there. Why doesn't he pull in right now and get scratchers? Why? Because we know he will circle around the gas station. He's casing it. That's what he is [going to] do. There is the Country Liquor. Does [Gatlin] go and go there and get scratchers? Why is he there? All we know is he buys scratchers. He didn't get gas. Why come to this intersection? If you think any of this is reasonable, then you vote not guilty."

When the prosecutor was fast forwarding the video, he said, "So now [Gatlin] walks over to the Country Liquor, and all this just for two lottery tickets. That's what happens. So as he is walking out—is this reasonable now?" Narrating, the prosecuted stated, "He pulls away, away from the gas station, and eventually comes back toward the gas station. Comes around there. Why did [defense counsel] talk about the need for [Gatlin] to have to reverse? Is that reasonable? All the cars have faced in, but [Gatlin], for whatever reason, has to reverse in. Why? That fact alone you can say to yourself, oh my God, come on, they are watching this location. Quick getaway. If you need to position it, you are not trying to wait. You need to be ready to get out of there. Can you see him reversing here. Is that reasonable? No. [Defense counsel] didn't play that because he knows his client is guilty."

Defense counsel objected, saying, "That's improper." The prosecutor asked to rephrase, and defense counsel asked to be heard at sidebar.

At sidebar, defense counsel stated, "What the [prosecutor] just did is improper. The [prosecutor] . . . spent all this time mentioning my name probably 500 times already—but I'm just estimating that number[] . . . —talking about why would I do this, why would I do that, that kind of stuff. But then now we have the [prosecutor] saying to the jury that I know he's guilty. I know he's guilty. That is improper by any stretch of the imagination[.]"

Defense counsel moved for a mistrial.

The trial court stated that it would sustain the objection to the statement. In response, defense counsel requested an admonition telling the jury that the prosecutor's statement was improper. The trial court replied, "[T]he motion for mistrial will be denied."

The trial court told the jury that the last objection was sustained, and ordered the jury to disregard the prosecutor's last statement.

The prosecutor resumed giving his rebuttal (and presumably resumed playing the same video from before), saying, "The point is, [defense counsel], in the argument he made, he didn't argue this because this evidence tends to show [Gatlin's] guilt of the action he was committing."

Referring to the police interview with Gatlin, the prosecutor said, "What is [defense counsel] talking about when he argues to you . . . that there is a specialized technique [the police] are employing. . . . They asked[,] '[I]s that you?' You get to decide who a reasonable person is. . . . [¶] Standard is

reasonable. Imagine, would a reasonable [person] act in this manner? Now you are in front of police and they are questioning you. They show you a picture of yourself. Is a reasonable person going to say, 'Yeah, that was me. I was at the liquor store.' Or is a reasonable person going to say 'Oh, oh, oh, yeah. That's me.' Come on."

The prosecutor continued on in the same vein, saying, "Are you serious? You need to go to school to ask 'Was anybody with you?' Does a reasonable person say 'Not really?' Vote not guilty if you think a reasonable person acts that way." The prosecutor referred to some additional interview colloquy, and said, "Do you think that is reasonable? Vote not guilty."

Next, the prosecutor said, "Nothing of what [Gatlin] did that day is reasonable, or any of these dates. Because [he] is guilty."

B. *Prosecutorial Misconduct*.

"A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel. [Citations.] 'An attack on the defendant's attorney can be seriously prejudicial as an attack on the defendant himself, and, in view of the accepted doctrines of legal ethics and decorum [citation], it is never excusable.' [Citation]." (*People v. Hill* (1998) 17 Cal.4th 800, 832.) "If there is a reasonable likelihood that the jury would understand the prosecutor's statements as an assertion that defense counsel sought to deceive the jury, misconduct would be established." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1302.) "[I]t is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its . . . obligation to overcome

reasonable doubt on all elements [citation]." (*People v. Marshall* (1996) 13 Cal.4th 799, 831.)

"If a charge of prosecutorial misconduct is based on a prosecutor's argument to the jury, the appellate court must consider whether there is a reasonable likelihood the jury construed or applied any of the challenged statements in an objectionable manner. [Citation.] The court must consider the challenged statements in the context of the argument as a whole to make its determination. [Citation.]" (*People v. Cowan* (2017) 8 Cal.App.5th 1152, 1159.)

A prosecutor's misconduct violates the federal Constitution when it is so egregious that it infects the trial with a degree of unfairness amounting to a denial of due process. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) If a prosecutor's misconduct results in a constitutional violation, a reviewing court must reverse the judgment unless the misconduct was harmless beyond a reasonable doubt. (*People v. Cook* (2006) 39 Cal.4th 566, 608.) Regarding California law, our Supreme Court has explained the following: "'Prosecutorial misconduct implies the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. [Citation.] The ultimate question to be decided is, had the prosecutor refrained from the misconduct, is it reasonably probable that a result more favorable to the defendant would have occurred.'" (*People v. Haskett* (1982) 30 Cal.3d 841, 866.)

"'To preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the improper argument. [Citations.]' [Citations.] A failure to timely object and request an admonition will be excused if doing either

would have been futile, or if an admonition would not have cured the harm. [Citation.]" (*People v. Linton* (2013) 56 Cal.4th 1146, 1205; *People v. Hill, supra,* 17 Cal.4th at pp. 820–821 [objections would have been futile given the poisonous atmosphere created by the prosecutor and the trial court's antipathy toward defense counsel].) Even if a claim of prosecutorial misconduct is not otherwise preserved for appeal "a reviewing court may, in its discretion, decide to review [such] a claim" if it affects a defendant's substantial rights. (*People v. Sanchez* (2014) 228 Cal.App.4th 1517, 1525 (*Sanchez*).)

Defense counsel did not object to the prosecutor's attempts to lessen the People's burden, or to his multitude of negative insinuations about defense counsel.[11] Consequently, the People contend that Gatlin forfeited his objection regarding the reasonable doubt standard. Presumably, the People would make the same argument as to the prosecutor's negative insinuations, and would have us only consider the objection to the statement that defense counsel knew his client was guilty. We conclude this is a proper case to exercise the discretion recognized in *Sanchez* to review Gatlin's claims even if they are forfeited because the misconduct he asserts implicates his substantial right to due process and a fair trial.

We conclude that the prosecutor committed misconduct by misstating the law regarding what the jury was required to decide (reasonableness of Gatlin's conduct rather than whether

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[11] At one point defense counsel essentially objected to the negative insinuations by noting that the prosecutor continually referred to defense counsel by name and characterized defense counsel's closing argument. This objection came after many of the insinuations.

the prosecutor proved the elements of the charged crimes), and by denigrating defense counsel and insinuating he was being deceptive. Given that the prosecutor's improper statements were the last thing the jury heard before deliberating, there is a reasonable likelihood the jury applied the prosecutor's statements in an objectionable manner. Because the prosecutor's case was built on debatable inferences of Gatlin's knowledge and intent, the misconduct is the likely explanation for the conviction for the March 21, 2015, robbery. We conclude that in the absence of this misconduct, it is reasonably probable the result would have been more favorable to Gatlin.[12]

C. *Ineffective Assistance of Counsel.*

"A defendant whose counsel did not object at trial to alleged prosecutorial misconduct can argue on appeal that counsel's inaction violated the defendant's constitutional right to the effective assistance of counsel." (*People v. Centeno* (2014) 60 Cal.4th 659, 674.) The elements of an ineffective assistance of counsel argument are (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficiencies resulted in prejudice. (*People v. Ledesma* (2006) 39 Cal.4th 641, 746.) If the record on direct appeal sheds no light on why counsel failed to act in the manner challenged, "an appellate claim of ineffective assistance of counsel must be rejected '. . . unless there simply could be no satisfactory explanation.' [Citations.]" (*Ibid.*)

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[12] In the future, the trial court would be well advised to follow the guidance of the Sixth Appellate District, which recently stated: "In the extreme case, . . . when the law is so misrepresented that the case is likely infected with prejudicial error, the trial court must intercede to ensure a fair trial." (*People v. Cowan, supra,* 8 Cal.App.5th at pp. 1154–1155.)

Reversal is required if it is "'reasonably probable that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' [Citation.]" (*Ibid*.)

This is a case in which defense counsel should have objected to the prosecutor's attempt to lessen the People's burden, and there simply is no satisfactory explanation for defense counsel's failure to object. It is reasonably probable that the result would have been different in the absence of defense counsel's deficiency because the prosecutor's misconduct was egregious and his case was weak.

All other issues are moot. [13]

WEBLY'S APPEAL

Webly was convicted on three counts of robbery, and he admitted that he suffered two prior serious or violent felony convictions for purposes of section 667, subdivision (a)(1) and the "Three Strikes" law (§§ 667, subds. (b)-(i) & 1170.12). The trial court denied Webly's *Romero*[14] motion to strike his priors. Webly was sentenced to 35 years to life on each count, each sentence to run consecutively. Webly's total aggregate sentence was 105 years to life.

We are satisfied that Webly's counsel complied with his responsibilities in connection with this appeal. We conclude that Webly has received adequate and effective appellate review of the judgment entered against him by virtue of counsel's compliance

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[13] We have reviewed the contention that the trial court should have granted a mistrial because members of the jury spoke to a police officer witness. We find no error.

[14] *Romero v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 504 (*Romero*).

with the *Wende* procedure, and our review of the record. (*Smith v. Robbins* (2000) 528 U.S. 259, 278; *People v. Kelly* (2006) 40 Cal.4th 106, 123–124.)

DISPOSITION

The judgment against Gatlin is reversed. As to the March 17, 2015, and March 18, 2015, robberies, judgment shall be entered in his favor. As to the March 21, 2015 robbery, Gatlin may be retried upon remand.

The judgment against Webly is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

I concur:

_____, J.*
GOODMAN

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* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

CHAVEZ, J., Concurring and Dissenting

I concur with the majority to the extent I agree that the prosecutor in the Gatlin trial erroneously argued the concept of reasonable doubt to the jury and that the consequence may have been to lessen the prosecutor's burden of proving the elements of each crime charged, beyond a reasonable doubt. I further agree that on that basis the case must be reversed as to all counts.

I also concur in the disposition of Webly's appeal.

However I respectfully disagree with the majority's conclusion that the evidence of Gatlin's guilt was legally insufficient to support the jury's finding as to both the March 17, 2015 and March 18, 2015 robberies. Therefore I would remand all three robbery cases to the trial court for retrial.

DISCUSSION

The evidence established that Scott, who lived near Gatlin, had loaned Gatlin her blue-green-gray Cadillac during March 2015. She also warned Gatlin not "to be messing with" various unsavory folks in the neighborhood, including Wes. Gatlin was identified as the driver of the Cadillac as part of the March 21, 2015 robbery. Scott also testified that on March 30, 2015, she, Gatlin and Wes rode together in her Cadillac to a Costco store where Wes purportedly attempted a fraud using Rahman's (victim of the March 18 robbery) Costco identification card. On April 2, 2015, LAPD Detective Raffi observed Gatlin driving the Cadillac to Webly's residence at the Siesta Motel.

The Kyocera and Samsung cell phones linked to all three of the robberies and the residences of Scott, Gatlin and Webly (Siesta Motel), were retrieved from the Cadillac when Gatlin was arrested. In addition, Gatlin's alibi recorded statement to the

police, which was played for and rejected by the jury, was evidence of Gatlin's consciousness of guilt -- a false alibi offered for the time period of the March 21, 2015 robbery.

"'In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence -- evidence that is reasonable, credible and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence and to special circumstance allegations. [Citation.] "[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding." [Citation.] We do not reweigh evidence or reevaluate a witness's credibility. [Citation.]' [Citations.]" (*People v. Nelson* (2011) 51 Cal.4th 198, 210.)

"In our limited role on appeal, '[c]onflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues not evidentiary conflicts; we look for substantial evidence.' [Citation.]" (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 161-162.)

When considered in their totality, rather than isolation, these facts, found to be true and reliable by the jury, support the inference of a threesome working together to wrongfully avail themselves of the property of others. The modus operandi of each robbery was the same, the same cell phones were used in a similar manner for each crime and the Cadillac was used by some combination of the same people all within a couple of week's time. When considered with a false alibi statement made by Gatlin, there is sufficient evidence to support the jury's conclusion that Gatlin was guilty as an aider and abettor of each robbery.

Thus I do not join with the majority in their conclusion that insufficient evidence supported the jury findings as to the robberies which occurred on March 17 and March 18, 2015. Instead I would reverse and remand all three robbery counts, subject to retrial, on the basis of prosecutorial error only.

I concur with the majority in affirming the judgment against Webly.

_____, J.
CHAVEZ